

COMPLIANCE BOARD OPINION NO. 95-11

December 18, 1995

Mr. Joseph D. Harris
Mr. Sean O'Sullivan

The Open Meetings Compliance Board has considered Mr. O'Sullivan's complaint dated May 12 and Mr. Harris' complaint dated May 25, 1995, in which you each alleged that the Ocean City Council had violated the Open Meetings Act in connection with its adoption of an ordinance governing solicitation and peddling on the Boardwalk. Because your complaints deal with the same topic, the Compliance Board has consolidated its response in this opinion.¹ The Board's opinion is based on the various written materials provided to the Board and the information gained at an informal conference held on November 28, 1995.

For the reasons stated in Part II below, the Compliance Board concludes that the City Council violated the Open Meetings Act.

I

Complaints and Response

Mr. O'Sullivan posits a series of unlawfully closed meetings between approximately August 1994 and May 4, 1995, when the City Council passed the ordinance in question. "The subject at a number of these meetings, according to members of the Ocean City Council, was legislation to ban all soliciting and peddling on the Ocean City Boardwalk." Mr. O'Sullivan also recounts the response of Council President Feehley "[w]hen questioned about why the discussions over this proposed law were kept secret for so many months" Mr. Feehley allegedly "said it was a 'legal' matter and thus exempt." According to Mr. O'Sullivan, the President also "said it would have

¹ The ordinance in question was challenged in federal court. One of the issues raised by those challenging the ordinance was an alleged violation of the Open Meetings Act. While this issue was pending in court, the Compliance Board suspended its own process. Once the law suit was resolved on other grounds, the Board reinstituted the complaint process.

been impossible for the council to move in and out of executive session as the law required. He added [that] the matter was ‘touchy’ and said he did not see how it could have been discussed in public.”

Mr. O’Sullivan suggests that any representations about a more limited scope of discussion during the closed meetings should be viewed with skepticism:

Despite Mr. Feehley’s comments and comments from several other council members who said the matter had been “discussed” in executive session for months, Ocean City Solicitor Guy Ayres has said none of the meetings violated the Open Meetings law and the sessions did not vary from the obtaining of legal advice.

Mr. Ayres’ comments seem to be at odds with the council’s descriptions of how the legislation was crafted. Also considering the fact that the bill, known as ordinance 1995-9, was passed unanimously in a hastily arranged emergency session where no substantial debate or discussion took place, it seems logical to conclude that substantial discussion and debate about the legislation took place behind closed doors.

Mr. Harris, too, focuses his concern on closed-door discussions related to Ordinance 1995-9. “On May 2, [the] Ocean City Council met in an executive session. On May 4, the media was called to an ‘emergency’ meeting in City Hall to hear Council’s vote on an ‘emergency’ change in the ordinance governing boardwalk solicitation and distribution. At that ‘public meeting,’ all members of Council voted to pass Ordinance 1995-9 At a later meeting, Councilman Vince Gisriel stated, for the record, that the Council did formulate the ordinance in an executive session. In that same meeting Council President George Feehley confirmed that fact in an interview” Mr. Harris also suggests that a procedural vote enabling the ordinance to be passed on an emergency basis likewise must have occurred in an illegally closed session.

In a timely response to Mr. O’Sullivan’s complaint on behalf of the Ocean City County Council, Guy R. Ayres, III, Esquire, denied that any violation of the Open Meetings Act occurred. Mr. Ayres acknowledges that there were “several closed meetings between August 1994, and May 4, 1995.” At each of these meetings, Mr. Ayres contends that the Council properly voted to close the session in order to obtain legal advice. “Since I was in attendance at each closed session, I can unequivocally state that I was providing legal advice relative to First Amendment rights of street performers, religious groups, etc.

on the public ways (the boardwalk in particular) in Ocean City.... [T]his is a very complex constitutional legal issue for lawyers, so the explanation to the mayor and councilmembers (none of whom are lawyers) was an extended and tedious process over months of time. At no time during any of these meetings was a vote cast to do anything.”²

Mr. Ayres reports that, at the May 2 closed session, he advised the Council that he would prepare an ordinance for its consideration. He then did so, and the ordinance was presented and passed at the May 4 meeting. Mr. Ayres acknowledges “that there was little public debate on the ordinance,” but points out that “[t]here is no requirement that there be any debate or discussion prior to the passage of an ordinance.”

In his response to Mr. Harris’ complaint, Mr. Ayres reasserts that the prior closed discussions all consisted entirely of his providing legal advice to his client. “At no time during these closed sessions was the ordinance ‘promulgated’ or the language thereof even discussed. Neither the mayor nor the councilmembers saw the ordinance until the morning of May 4, 1995, in open session, when it was passed.” Mr. Ayres also denies that the Council’s procedure in enacting the ordinance on May 4 breached the City’s charter.³

By letter dated August 28, 1995, Alice Neff Lucan, Esquire, submitted a further analysis on behalf of Messrs. Harris and O’Sullivan.⁴ In part, Ms. Lucan draws an inference that there must have been policy discussions at some of the meetings closed for the purpose of obtaining legal advice:

There were many issues to consider before Mr. Ayres rendered his opinion on the constitutionality of the restrictions he proposed in his ordinance draft. Presumably council would require some formal recitation of the problem. It would want to identify the harmful activity and the actors, evaluate the harm done, discuss a variety of desirable remedies and the consequences of taking no action at all. Unless Council

² The Mayor and City Council of Ocean City, citing the “utmost importance” of the attorney-client privilege, declined to provide the Board with access to the tape recordings of the closed meetings in question.

³ The Open Meetings Compliance Board has no authority to consider alleged violations of a municipal charter.

⁴ Ms. Lucan indicated that Mr. Harris is her client. Mr. O’Sullivan is not, but, “he has seen this response and adopts it as his own.”

members want to admit they discussed none of this, deliberation must have taken place behind closed doors.

Ms. Lucan also suggests that, insofar as Mr. Ayres was providing advice on the constitutionality of the proposed ordinance, the meetings ought to have been open as a policy matter. “It is hard to imagine what should be kept secret in a discussion of First Amendment law, especially under a rubric so fully developed by the case law.”

The Compliance Board afforded Mr. Ayres an opportunity to respond to Ms. Lucan’s submission. In his letter of September 29, 1995, Mr. Ayres reiterated that “[e]very meeting that the City Council held in closed session when the subject matter was discussed was to seek my legal advice as to a number of questions individual councilmembers had relative to First Amendment rights and the extent of those rights as it pertains to obstructing public property to street perform [*sic*], solicit money, sell T-shirts, etc.” Mr. Ayres suggests “[t]hat the City Council can meet in closed session with its attorney to discuss anticipated litigation, the ramifications thereof and to discuss how to hopefully avoid same or to defend same.” Mr. Ayres insists that the Council’s right to obtain legal advice in closed session was in no way diminished merely because the issues concerned the First Amendment.

Further, at the informal conference on November 28, Mr. Ayres pointed out that the issue before the Council was not a new one. As far back as the 1970s, Ocean City had an ordinance limiting the locations in which First Amendment activity might take place. When the problem arose of an organization selling T-shirts, ostensibly as an exercise of its First Amendment rights, the issue was simply a tightening of the City’s existing ordinance. Mr. Ayres indicated that, at the eight or ten closed meetings at which the matter was discussed, it was clear to him from the questions posed that Council members wanted this particular activity banned from the Boardwalk. However, Mr. Ayres said, there was no “crafting of the ordinance” at any of these meetings.

II

Discussion

The Open Meetings Act assumes that a legislative body will have a deliberative process prior to making new law. The term “legislative function” is defined in part “as the *process* or act of ... approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy” §10-502(f)(1) of the State Government Article, Maryland Code (emphasis added). Although the General Assembly’s own process – a committee

hearing, a committee debate, and then floor debate – is hardly universal, few would think that a law could be enacted without “the deliberations and decisions that the making of public policy involves.” §10-501(a)(2)(ii). Those deliberations are to be open to public observation, unless a specific exception permits a closed session.

Once such exception relates to legal advice. A legislative body may close a session in order to “consult with [its] counsel to obtain legal advice.” §10-508(a)(7). Even if the advice concerns proposed legislation, the session may still be closed for that purpose.

Of course, a legislative body may not use the “legal advice” exception as a mask for policy deliberations. Once the advice has been sought and provided, the body must return to open session to discuss the policy implications of the advice that it received or anything else about proposed legislation. *See* Compliance Board Opinions 92-1 (October 15, 1992), 93-11 (November 30, 1993), and 95-2 (June 20, 1995).

Stating these principles is easy. Applying them here is difficult. The complainants draw the conclusion that, because the City Council held a series of closed meetings on a controversial topic and ultimately enacted an ordinance on that topic, it must have conducted policy discussions in those closed sessions. The City Attorney denies that policy deliberations occurred.

The Compliance Board accepts the representations of the City Attorney that a deliberative process of the conventional kind did not precede the enactment of the ordinance in question. That is, we accept the premise that the members of the City Council did not discuss among themselves the underlying policy considerations of an ordinance banning First Amendment activity from the Boardwalk and did not craft the language of the ordinance in closed session.

Nevertheless, the legal issue is not whether the Ocean City Council had a conventional policy deliberation or took a vote behind closed doors; rather, it is whether *any* aspect of their closed-door discussion went beyond the exception for legal advice. The Compliance Board concludes that the limit of the exception was exceeded. At the informal conference on November 28, Council President Feehley acknowledged that the Council had discussed in closed session the need to have an ordinance drafted, albeit there was no discussion of its specific content. Moreover, at a closed session the Council President instructed Mr. Ayres to draft an ordinance. The Compliance Board accepts that this instruction was not preceded by a formal vote or debate. Nevertheless, this instruction, however brief and however devoid of

substantive discussion, went beyond the obtaining of legal advice from the City Attorney.

The Compliance Board does not view the matter as a technical violation. A decision by the Council that the City Attorney was to draft an ordinance amounted to a preliminary decision that the perceived problem required a legislative response. This decision was a key component of the legislative process at work here, and the absence of a vote or debate preceding the decision is not proof against an Open Meetings Act violation. The press and public would have found this decision to have been of keen interest. It was required to have been made in open session, however inconvenient the Council might have perceived this requirement. That the decision was instead made in closed session violated the Open Meetings Act.

OPEN MEETINGS COMPLIANCE BOARD

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